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10/580,379	02/13/2007	Raymond John Bacon	508-051,009	2557

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EXAMINER

SHEARER, DANIEL R

ART UNIT

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3754

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/580,379

**Applicant(s)**

BACON, RAYMOND JOHN

**Examiner**

DANIEL R. SHEARER

**Art Unit**

3754

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 03 November 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,3,6-11,13,14 and 17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,6-11,13,14 and 17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 22 May 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Drawings***

1. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the slug of claims 11, 13, and 14 in combination with the tapered tip of claim 1 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1, 3, 6, 9, 11, 13, 14 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,013,800 to Brunet in view of U.S. Patent Pub. No. 2005/0211241 to Anderson et al. (Anderson).

Brunet shows a dispenser for a gaseous, gas borne or droplet substance comprising a source (2) of the substance, wherein the substance comprises medicament and propellant (Col. 1, ll. 7-20) and the source comprises a reservoir (2) and a release valve (3). The reservoir comprises: a major portion (A in examiner annotated figure below) having a comparatively large cross-section of its substance space and a minor portion (B in examiner annotated figure below) in the form of a tapered tip having a comparatively small cross-section of its substance space and at the opposite end of the source from the release valve (Fig. 1).

Brunet fails to disclose that the reservoir is translucent or transparent and is silent with respect to the material of the container.

Anderson shows a dispenser for a medicament (Pg. 1, paragraph 0001) comprising a reservoir (30), a housing (10), and a release mechanism (29), wherein the reservoir comprises: a major portion (portion of 30 above 35) having a comparatively

large cross-section of its substance space and a minor portion (35) at the opposite end of the source from the release mechanism (Fig. 4) in the form of a tapered tip having a comparatively small cross-section of its substance space and further discloses that the reservoir is formed from transparent materials such as glass or plastic (Pg. 4, Paragraph 0094) and the housing has a window (28) to view the level of fluid in the container (Pg. 3, paragraph 0078).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have manufactured the reservoir of Brunet out of a transparent or translucent plastic or glass and a window in the housing as taught by Anderson to allow the user to view the level of fluid in the container. The combination would result in a user being capable of inverting the dispenser so that it is valve up being able to observe the level of substance in the minor portion and note the comparatively rapid depletion with use of the quantity of substance remaining when the source approaches exhaustion of the substance.

Regarding claim 3, Brunet shows that the minor portion (B in examiner annotated figure below) of the reservoir has a progressively diminishing cross section whereby the rate of fall of the level of substance increases as it is further depleted (inherent effect from diminishing cross section).

Regarding claims 11, 13 and 14, Brunet shows that the reservoir is provided with a slug (C, D in examiner annotated figure below) which substantially reduces the cross-section thereof, includes a uniform cross section (C in examiner annotated figure below

has constant cross section) and is tapered (D in examiner annotated figure below tapers).

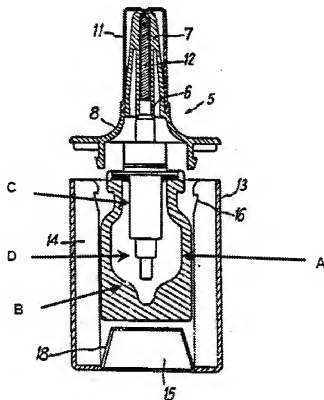


Fig. 2 of Brunet as annotated by examiner

4. Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brunet in view of Anderson as applied to claim 6 above, and further in view of U.S. Patent No. 6,866,158 to Sommer et al. (Sommer).

The Brunet-Anderson combination discloses all aspects of the applicant's invention as set forth in claim 6, but fails to disclose that the glass reservoir is enclosed

in a plastics material sheath that is a shrink wrapping or an insert molding. Sommer teaches a glass bottle enclosed in a plastics material sheath by insert molding (Col. 3, ll. 20-25) and discloses that enclosing glass reservoirs in a plastics material sheath provides protection against bursting and/or shattering (Col. 1, ll. 16-23). It would have been obvious to one having ordinary skill in the art at the time the invention was made to have manufactured the glass reservoir of Brunet as modified by Anderson with an insert molded plastics material sheath as taught by Sommer to provide protection against bursting and/or shattering.

5. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Brunet in view of Anderson as applied to claim 9 above, and further in view of U.S. Patent No. 3,506,004 to Mann et al. (Mann).

The Brunet-Anderson combination discloses all aspects of the applicant's invention as set forth in claim 9 and further discloses that the reservoir is enclosed by a robust outer enclosure (Brunet, 13), but fails to disclose that the enclosure is impermeable. Mann shows an aerosol medicament dispenser (Col. 1, ll. 11-14, comprising a release valve (Col. 2, ll. 11-14), and a reservoir (20) that is enclosed by a robust, impermeable outer enclosure (21) to keep the reservoir isolated from dust and other contaminants (Col. 3, ll. 21-24. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have manufactured the outer enclosure of Brunet as modified by Anderson to be impermeable as taught by Mann to keep the reservoir isolated from dust and other contaminants.

***Response to Arguments***

6. Applicant's arguments filed 11/3/2010 have been fully considered but they are not persuasive.

7. In response to applicant's argument that the slug of claims 11, 13 and 14 is shown in figure 3, it is noted that the drawings are objected to because although a slug is shown in figure 3, the slug is not shown in the embodiment described in claim 1, namely, in combination with a minor portion in the form of a tapered tip.

8. The applicant argues that the dispensers of Brunet and Anderson are designed to be operated valve up, and therefore would not be inverted to the valve up position to observe the level of substance in the minor portion. It is noted that the arguments are not germane or commensurate to the scope of the claimed invention. The claims are directed to a device and while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. The functional recitation of "so that a user inverting the dispenser so it is valve up can observe the level of the substance in the minor portion and can note a comparatively rapid depletion with use of the quantity of substance remaining when the source approaches exhaustion of the substance" imparts no additional structure. In the instant case, the device of the Brunet-Anderson combination satisfies all of the structural limitations of claim 1 as discussed in the rejection above and is capable of being inverted from a position to a valve up position to allow a user to observe the quantity of substance in the minor portion (see



Column 1, lines 45-48 of Brunet, invention is of very small size and therefore able to be manipulated from non-inverted to inverted positions in which a user can observe the quantity of substance by virtue of the transparent material taught by Anderson).

9. Applicant asserts that Figure 4 of Anderson suggests that the window 28 does not in fact extend down to the bottom of the tip. Since Figure 4 of Anderson does not show the housing on the reservoir it is unclear how it suggests that the window does or does not extend down to the bottom of the tip. However, claim 1 neither requires nor precludes a housing and therefore the combination would satisfy the limitations recited in the claim with or without the window. Furthermore, when applying the Anderson teaching to the Brunet device, it would have been obvious to one of ordinary skill in the art at the time of the invention to have extended the window to the bottom of the reservoir since Anderson states in paragraph 0078 that the purpose of the window is to be able to view the level of fluid within the container.

10. Applicant argues that Anderson teaches away from the dispenser of the claimed invention since the purpose of the tapering tip is to allow for more fluid to be collected than if a flat bottom container is used and during use of the present invention, the medicament flows away from the tapered end of the source toward the valve end. This argument is not persuasive because Anderson is not relied upon to teach the tapering tip but merely to show a reservoir formed from transparent materials such as glass or plastic to view the level of fluid in the container. Furthermore, the claims include no limitations or recitations requiring that during use the medicament collects in the major

portion or flows away from the tapered end but merely that the minor portion is opposite the release valve which is taught by both Brunet and Anderson.

11. In response to applicant's argument that a person of ordinary skill in the art reading Brunet would not combine its teachings with those of Anderson because of the fundamental differences between the dispensers of each of the references and therefore their status as nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, both devices are in the field of applicant's endeavor, namely, medicament spray dispensers.

### ***Conclusion***

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DANIEL R. SHEARER whose telephone number is (571)270-7416. The examiner can normally be reached on Monday through Friday 8:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Shaver can be reached on (571)272-4720. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. R. S./  
Examiner, Art Unit 3754  
/Kenneth Bombberg/  
Primary Examiner, Art Unit 3754

